Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-1075–06 OF 2016 AND W-02(C)(A)-1076–06 OF 2016
HAMID SULTAN, UMI KALTHUM AND SURAYA OTHMAN JJCA
20 OCTOBER 2017

Arbitration — Award — Setting Aside — Reference of question of Law — Delay in making award — Whether arbitrator's conduct in arbitration proceedings could be challenged — Whether against public policy — Whether court had discretion to intervene and set aside award on public policy or breach of natural justice purely on delay point — Whether there was substantial pre-award interest as result of delay in award — Whether award unjust — Whether appellate intervention was necessary

Asean Bintulu Fertilizer Sdn Bhd ('the appellant') had engaged Wekajaya Sdn Bhd ('the respondent') to construct a urea storage building. The parties entered into a contract, which, inter alia, provided for the payment of a provisional sum for rock excavation of 25,000 cubic metres. Disputes arose between the parties and the matter was referred to arbitration by the respondent/claimant at a time when the Arbitration Act 1952 ('the 1952 Act') was in force. It was the respondent/claimant's case that the appellant was liable to pay the respondent the increased costs of completing the works or prolongation costs because the delays to the completion of the construction works was caused, inter alia, by the misrepresentation of material facts by the appellant, such as the amount of rock on the construction site. The appellant argued that the increased costs were a result of the delays to the completion of the construction works caused by or contributed to by the respondent/claimant. The final award delivered by the arbitrator was in favour of the respondent/claimant. The appellant applied to the High Court to set aside the award pursuant to s 37 of the Arbitration Act 2005 ('the 2005 Act'). The appellant also applied under s 42 of the 2005 Act to vary that part of the award that was based on an error of law, namely the calculation of interest on the award. In addition, the appellant also complained of a delay, that is the delay of about four years to deliver the award and a further delay taken from the commencement of the arbitration proceedings to the delivery of the award, which was about ten years. The High Court judge dismissed the appellant's application to set aside the award ('the first appeal') and the application under s 42 of the Act ('the second appeal'). However, taking into account the appellant's contention on pre-award interest the High Court judge had amended the interest provision in the award. The present appeals are against the decision of the High Court. In the first appeal the appellant submitted that the High Court judge had erred in law and in fact in refusing to

intervene to set aside the award despite there being clear errors made by the arbitrator, as a result of delay of approximately four years in publishing the arbitration award. The appellant also submitted, inter alia, that the High Court judge had failed to appreciate that the failure of the respondent to provide adequate evidence or a failure to meet the necessary standard of proof was a ground to set aside an arbitration award. In relation to the second appeal, the appellant argued that the High Court judge had failed to appreciate that the arbitrator was wrong in arriving at the conclusion that there was an act of misrepresentation or a collateral warranty. The appellant also contended that as a result of the delay in issuing the award, the appellant was being penalised by interest.

Held, dismissing the appeal with costs, subject to allocatur fees:

(1) The delay issue could not be the sole reason for appellate intervention when in the instant case the learned arbitrator had delivered a speaking award within the contemplation of the law. This was because of the protection afforded to the arbitrator by s 47 of the Act. Arbitrators or adjudicators, even appointed by KLRCA, were not subject to disciplinary action for conduct, unbefitting of the professional obligation. Basically, s 47 of the Act to some extent gave immunity to the arbitrator for misconduct. Thus, the arbitrator in Malaysia was a protected species and his conduct in arbitration proceedings in a limited sense could not be challenged unless bad faith could be established (see paras 14, 16 & 18).

(2) Under the old regime ie the Arbitration Act 1952, the court had unfettered discretion to intervene to set aside the award. This wide discretion has been curtailed by the Arbitration Act 2005. Now that, that discretion has been curtailed, s 37 of the 2005 Act did not give the courts a free hand to set aside an award based on public policy or breach of natural justice purely on a delay. In effect, there was limited procedural mechanism to address delay issues under the 2005 Act and failure to resort to those measures would disentitle a party to set aside the award on grounds of delay. Further, s 36 of the 2005 Act places a higher threshold on the court when it intends to set aside an award related to a s 37 application under the 2005 Act. As such, the discretion given to the courts to intervene and set aside an award on public policy or breach of natural justice purely on a delay point would be a non-starter (see paras 19–20).

(3) The considerations for intervention under s 42 of the 2005 Act, were whether the point of law attempted to be raised would have substantial effect on the arbitration, or the point had been raised before the arbitrator, or arbitrator's decision should be obviously wrong or the question should be of general public importance and open to serious doubt, or it should be just and proper for the court to determine the

question. In the present appeal, the High Court judge in his attempt to save the award, had taken the initiative to comb the award to justify that the award should stand save for the adjustment related to interest. In the circumstances, the appellant had not made out a case for s 42 to apply and thus appellate intervention was not warranted, with the appeal dismissed in limine (see paras 22–23).

[Bahasa Malaysia summary

Asean Bintulu Fertilizer Sdn Bhd ('perayu') telah melantik Wekajaya Sdn Bhd ('responden') untuk membina bangunan penyimanan urea. Pihak-pihak telah memasuki kontrak, yang mana, antara lain, memperuntukkan untuk bayaran jumlah sementara untuk penggalian batu sebanyak 25,000 meter padu. Pertikaian timbul antara pihak-pihak dan perkara itu telah dirujuk kepada timbang tara oleh responden/penuntut pada masa apabila Akta Timbang Tara 1952 ('Akta 1952') berkuat kuasa. Ia adalah kes responden/penuntut bahawa perayu bertanggungjawab untuk membayar responden kos yang meningkat untuk menyiapkan kerja atau kos pemanjangan kerana kelewatan untuk menyiapkan kerja pembinaan adalah disebabkan, antara lain, oleh salah nyataan fakta material oleh perayu, contohnya jumlah batu di tapak pembinaan perayu berhujah bahawa kos yang meningkat itu adalah akibat kelewatan untuk menyiapkan kerja pembinaan yng disebabkan oleh atau disumbang oleh responden/penuntut. Award muktamad yang disampaikan oleh penimbang tara menyebelahi responden/penuntut. Perayu telah memohon kepada Mahkamah Tinggi untuk mengetepikan award itu menurut s 37 Akta Timbang Tara 2005 ('Akta 2005'). Perayu juga memohon di bawah s 42 Akta 2005 untuk mengubah bahagian award tersebut yang berdasarkan kesilapan undang-undang, iaitu pengiraan faedah ke atas award itu. Selain itu, perayu juga mengadu tentang kelewatan, iaitu kelewatan lebih kurang empat tahun untuk menyampaikan award itu dan kelewatan selanjutnya yang bermula dari prosiding timbang tara hingga penyampaian award itu, iaitu lebih kurang sepuluh tahun. Hakim Mahkamah Tinggi telah menolak permohonan perayu untuk mengetepikan award itu ('rayuan pertama') dan permohonan di bawah s 42 Akta tersebut ('rayuan kedua'). Walau bagaimanapun, dengan mengambil kira hujah perayu berhubung faedah pra-award itu hakim Mahkamah Tinggi telah meminda peruntukan faedah dalam award itu. Rayuan-rayuan ini adalah terhadap keputusan Mahkamah Tinggi. Dalam rayuan pertama perayu berhujah bahawa hakim Mahkamah Tinggi telah tekrhilaf dari segi undang-undang dan fakta kerana enggan campur tangan untuk mengetepikan award itu meskipun jelas terdapat kesilapan yang dibuat oleh penimbang tara, akibat kelewatan kira-kira empat tahun dalam menyampaikan award timbang tara itu. Perayu juga berhujah, antara lain, bahawa hakim Mahkamah Tinggi telah gagal menghargai bahawa kegagalan responden untuk mengemukakan keterangan yan mencukupi atau suatu kegagalan untuk memenuhi piawai bukti yang dikehendaki adalah satu alasan untuk mengetepikan award timbang tara. Berhubung rayuan kedua, perayu

berhujah bahawa hakim Mahkamah Tinggi telah gagal menghargai bahawa penimbang tara telah salah dalam membuat kesimpulan bahawa terdapat perbuatan salah nyataan atau suatu kolateral waranti. Perayu juga berhujah bahawa akibat kelewatan dalam mengeluarkan award itu, perayu telah didenda dengan faedah.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Isu kelewatan tidak boleh menjadi satu-satunya sebab untuk campur tangan rayuan apabila dalam kes ini penimbang tara yang bijaksana telah menyampaikan award secara lisan dalam konteks undang-undan. Ini adalah kerana perlindungan yang diberikan kepada penimbang tara oleh s 47 Akta tersebut. Penimbang tara atau pengadil, walaupun dilantik oleh KLRCA, tidak tertakluk kepada tindakan tatatertib untuk kelakuan, yang tidak bertanggungjawab terhadap kewajipan profesional. Pada asasnya, s 47 Akta tersebut memberi kekebalan kepada penimbang tara kerana salah laku. Oleh itu, penimbang tara di Malaysia adalah dilindungi dan perlakuannya dalam prosiding timbang tara secara terhad tidak boleh dicabar kecuali niat jahat boleh dibuktikan (lihat perenggan 14, 16 & 18).

(2) Dalam rejim lama, iaitu Akta Timbang Tara 1952, mahkamah mempunyai budi bicara tidak terbatas untuk campur tangan bagi mengetepikan award itu. Budi bicara yang luas ini telah disekat oleh Akta Timbang Tara 2005. Kini, oleh kerana budi bicara tersebut telah disekat, s 37 Akta 2005 tidak memberikan mahkamah kebebasan untuk mengetepikan award berdasarkan polisi awam atau pelanggaran keadilan semulajadi semata-mata kerana suatu kelewatan. Akibatnya, terdapat mekanisme procedural yang terbatas untuk menangani isu-isu kelewatan di bawah Akta 2005 dan kegagalan untuk mengambil langkah-langkah tersebut akan menidakkan hak satu pihak untuk mengetepian award itu atas alasan kelewatan. Selanjutnya, s 36 Akta 2005 meletakkan ambang yang lebih tinggi ke atas mahkamah apabila ia berhasrat untuk mengetepikan award berkaitan dengan permohonan s 37 di bawah Akta 2005. Oleh itu, budi bicara yang diberikan kepada mahkamah untuk campur tangan dan mengetepikan suatu award berdasarkan polisi awam atau pelanggaran keadilan semulajadi semata-mata kerana suatu kelewatan tidak menjadi suatu untuk dimulakan (lihat perenggan 19–20).

(3) Pertimbangan untuk campur tangan di bawah s 42 Akta 2005, adalah sama ada poin undang-undang yang cuba ditimbulkan mempunyai kesan substantial ke atas timbang tara, atau poin itu telahpun ditimbulkan di hadapan timbang tara, atau keputusan timbang tara sepatutnya jelas salah atau persoalan itu sepatutnya mempunyai kepentingn awam secara amnya dan terbuka untuk dirahui secara serius,

A atau ia sepatutnya adil dan wajar untuk mahkamah menentukan persoalan itu. Dalam rayuan ini, hakim Mahkamah Tinggi dalam percubaan beliau untuk menyelamatkan award itu, telah mengambil inisiatif untuk menyisirkan award itu bagi menjustifikasikan bahawa award itu patut kekal tetapi tertakluk kepada pelarasan yang berkaitan
B faedah. Dalam keadaan itu, perayu tidak membuktikan kes agar s 42 terpakai dan oleh itu campur tangan rayuan adalah tidak wajar, dan rayuan ditolak in limine (lihat perenggan 22–23).]

Notes

C For cases on setting aside, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2021–2107.

Cases referred to

Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd [2016] MLJU 354; [2016] 1 LNS 1089, HC (refd)
D
BV Scheepswerf Damen Gorinchem v Marine Institute [2015] EWHC 1810 (Comm), QBD (refd)
Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others [1993] 1 All ER 664, HL (refd)
E *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43, HL (refd)
Monie and Others v Commonwealth of Australia [2005] NSWCA 25, SC (refd)
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR 597, CA (refd)
F *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005)
G Arbitration Act 2005 ss 36, 37, 37(6), 42, 47

Appeal from: Originating Summons Nos 24C(ARB)-16–03 of 2015 and 24C(ARB)-7–02 of 2015 (High Court, Kuala Lumpur)

H *Wong Kah Hui (Raja Yasmin with him) (Kadir, Andri & Partners) for the plaintiff.*
Rajendra Navaratnam (Mak Hon Pan with him) (Azman Davidson & Co) for the defendant.

I **Hamid Sultan JCA (delivering judgment of the court):**

[1] The two appeals arising from the same award was fixed for hearing before us on 19 June 2017. They are Appeal No W-02(C)(A)-1075–06 of 2016 which relates to s 37 of the Arbitration Act 2005 ('the AA 2005') and Appeal

No W-02(C)(A)-1076–06 of 2016 relates to s 42 application. A

[2] The learned trial judge had written a meticulous judgment setting out the law and facts in great detail. In addition, the learned judge had taken upon himself to exercise a curial scrutiny of the issues related to s 42 application as though it was an appeal related to a judgment of the court. In doing so, the learned judge had justified the reasons for sustaining the award and also to the amendment of the award and that part of the judgment reads as follows: B

> [157] In a reference under s 42 on a question of law, unlike a setting aside under s 37 of the AA 2005, this court is permitted to vary part of an award as may be affected by the error of law that has been proved to have applied to the calculation of interest here. To allow double interest to be charged would be to perpetuate an injustice on ABF and would be unconscionable in the circumstances of the case as interest on the debit notes was already charged at 1.5% per month on all overdue accounts. This is an error of law that satisfies that requirement under s 42 of the AA 2005 wherein this court would be constrained to excise the part of the award of interest affected and to leave intact the unaffected part. C D
>
> [158] I had therefore ordered that the interest of 8%pa simple interest on the financial charges be varied such that interest at 8%pa simple interest should only run on the Financial Charges of RM4.631,647.37 from 1 December 2006 to 1 August 2012 and thereafter at 5%pa simple interest until actual realization and not from 31 March 2003. I also allowed costs of RM10,000 to ABF. E

[3] The application under s 37, principally based on public policy was dismissed by the learned trial judge, notwithstanding there was a serious complaint of delay by the learned arbitrator in delivering the award. F

[4] After hearing the submissions, we directed further submissions and reserved our judgment to a date to be fixed. G

BRIEF FACTS

[5] The facts of the case is not complicated but for the issues to be determined by the learned arbitrator naturally requires great skill and knowledge, though there cannot be any justification for the delay in delivering the award. The delay complained of is about four years to deliver the award. The period taken from the commencement of the arbitration proceedings to the delivery of the award was about ten years. The delay complained of in this case is a classic example for stakeholders to push for legislative measures to check misconduct of arbitrators to preserve the integrity of the arbitration process and enhance the growth of domestic as well as international arbitration. We will deal with the issue of delay and injustice complained of shortly. H I

[6] We do not wish to repeat the facts of the case in any detail as it has been dealt with by the learned judge in a 108 pages judgment. The judgment is reported as *Asean Bintulu Fertilizer Sdn Bhd v Wekajaya Sdn Bhd* [2016] MLJU 354; [2016] 1 LNS 1089. This judgment must be read together with that judgment to appreciate our grounds in the proper perspective.

[7] We will summarise the facts in our own words as follows:

(a) the appellant is the employer and the respondent is the contractor who was engaged to construct urea storage building;

(b) dispute arose between the parties and the matter was referred to arbitration in the year 2003 at a time Arbitration Act 1952 was in force;

(c) ten issues were submitted before the arbitrator and learned judge had summarised them as follows:

> Issue 1: Whether given that the contract provides a Provisional Sum for rock excavation of 25,000 m3, the Claimant (WSB) is entitled to an extension of time as a result of the discovery of the rock?
>
> Issue 2: Whether the Respondent (ABF) had misrepresented any material facts or had given any warranty as to the amount of rock on site?
>
> Issue 3: Whether the parties had agreed to an extension of time to 20 July 2002 based on excavation of 16,000 m3 of rock only?
>
> Issue 4: Whether there are any other events of delay that would entitle the Claimant (WSB) to an extension of time beyond 20 July 2002?
>
> Issue 5: If the above question is answered in the affirmative, whether the extension of time to July 2002 adequately takes into consideration these other events of delay?
>
> Issue 6: Whether the delays to the completion of the Works were caused by or contributed to by WSB?
>
> Issue 7: Whether if WSB is entitled to an extension of time to July 2002 (or to another date) the amount of prolongation costs that the Claimant WSB is entitled to?
>
> Issue 8: Whether apart from the claim for prolongation costs, WSB is entitled to any of its other claims?
>
> Issue 9: Whether if WSB is only entitled to extension of time to July 2002, ABF is entitled to claim for liquidated damages for the delay caused by WSB?
>
> Issue 10: Whether ABF is entitled to the increased costs of completing the works?

(d) the submission ended in 2009 and the final award was delivered on 26 December 2014;

(e) the award was in favour of the claimant/respondent and reads as follows:

(1) That ABF shall pay the sum of RM 12,342,185.29 to WSB;

(2) That ABF shall pay interest at the rate of 8% simple interest per annum on the sum of RM12,342,185.29 from 31 January 2003 to WSB to 1 August 2012;

(3) Thereafter ABF shall pay interest at the rate of 5% simple interest per annum on the sum of RM12,342,185.29 from 2 August 2012 until the actual realization of the said payments;

(4) That ABF shall bear and pay WSB's costs of this Arbitration on a party and party basis;

(5) That ABF shall pay the costs of the Award,

(6) That all other requests and claims of WSB and ABF are rejected.

(f) the particulars of the award sum of RM12,342,185.29 read as follows:

A.	Value of work done and variations:	RM3,259,666.22
B.	Loss of profit from omission of works:	RM 90,277.39
C.	Financial Charges:	RM4,631,647.37
D.	Prolongation Costs:	RM4,360,594.31
	TOTAL	RM12,343,185.29

[8] The memorandum of appeal in Appeal 'No 1075' reads as follows:

(1) The Learned High Court Judge erred in law and in fact in refusing to intervene to set aside the arbitration award despite the fact that the Arbitrator had made his findings without credible evidence. In this regard, the Learned High Court Judge erred in fact and in law when he failed to consider the following:

(a) That the Arbitrator was clearly wrong to hold that the Respondent is entitled to financial charges amounting to RM 4,631,647.37 when there was no evidence to support any such claim or that the Respondent had in fact suffered any such loss.

(b) That it is clear from the witness statements filed in the arbitration that the Respondent's claim for financial charges is not based on the audited accounts but rather based on an internal statement of accounts.

(c) That in any event, the Respondent did not call the auditor as a witness at the arbitration to explain its auditor's report which does not explain the interest rate applicable for financial charges.

(d) That it simply does not make sense as to how financial charges can amount to RM 4,631,647.37 for the disputed extended contract period of 14 months which amounts to close to 40% of the contract value.

(e) That the invoice tendered by the Respondent does not prove that it had incurred those monies.

(f) That the Respondent had not tendered any evidence to proof that it incurred losses in the form of financial charges amounting to RM4,631,647.37.

(2) The Learned High Court Judge erred in law and in fact in refusing to intervene to set aside the arbitration award despite there being clear errors made by the Arbitrator as a result of delay of approximately 4 years in publishing the arbitration award. In this regard the Learned High Court Judge has erred in fact and in law when he failed to appreciate the following:

(a) That the arbitrator took a period of 4 years from the close of submissions to issue the final award which amounts to an inordinate delay of which no explanation has been given by the arbitrator.

(b) That it is the duty of the arbitrator, an individual whom has been paid a significant amount of monies, to carry out his function as an administrator of justice to issue the arbitration award within a reasonable time.

(c) That the arbitrator was jointly appointed for his expertise with the believe that he will issue his award promptly so that the dispute between the parties can be resolved within a reasonable time.

(d) That it is not for the parties to remind the arbitrator to issue the arbitration award and neither should the parties be obliged to have to take steps to terminate the arbitrator's appointment.

(e) That the risks of reminding an arbitrator are obvious and the option of terminating the appointment of the arbitrator means having to go through the entire process once again which is a very time consuming and costly affair.

(f) That the Kuala Lumpur Regional Centre for Arbitration's Arbitration Rules provides that an award must be issued within 3 months from the close of pleadings unless time has been extended.

(g) That once there has been a significant delay in the issuance of the arbitration award, the said award cannot be accorded the same deference of that of an award which is issued promptly.

(h) That given the limited grounds on which an arbitration award can be set aside, this presumes that an award has been properly and properly issued by the arbitrator and the delay (of 4 years) in the issuance of an award, cannot be accepted as it is contrary to not only what the parries expect and is against the public policy of law of arbitration in Malaysia.

(i) That the arbitrator could not have properly evaluated the evidence, 4 years after close of submissions and 5 years after the evidence was recorded.

(3) That the Learned High Court Judge failed to appreciate that the failure of the Respondent to provide adequate evidence or a failure to meet the necessary standard of proof is a ground to set aside an arbitration award.

(4) That the Learned High Court Judge for reasons set out above failed to appreciate that the arbitration award should be set aside on the grounds of public policy.

[9] The memorandum of appeal in Appeal 'No 1076' reads as follows:

(1) The Learned High Court Judge erred in law and in fact in dismissing the following questions of law put before him:

(a) Question 1: Whether given that the contract provides a provisional sum for rock excavation of 25,000m3, was the Respondent entitled to an extension of time as a result of the discovery of rock?

(b) Question 2: Whether as a matter of law if the contract requires a party to inspect the site, can it derogate its responsibilities by relying on the alleged representations made by other parties?

(c) Question 4: Whether if the Arbitration Act 1952 is silent on the issue of the granting of pre-award interest, does the arbitrator has the powers to grant pre-award interest?

(2) The Learned High Court Judge erred in law and in fact in not answering Question 1 in the negative. In this regard, the Learned High Court Judge erred in law and in feet when he failed to consider the following:

(a) That a provisional sum is in respect of works which cannot be sufficiently defined or properly evaluated at the time when the contract is evaluated.

(b) That the Respondent had agreed to excavate the amount of hard rock based on the unit rates as agreed.

(c) That when, the Respondent entered into the contract, the Respondent was aware that there was a potential need to carry out rock excavation but the amount of rock that was to be extracted was unclear and it is for this reason the value of these works were treated as provisional.

(d) That the arbitrator was wrong to find that there was a separate contract.

(e) That the Respondent is not entitled to any extension of time in carrying out provisional works.

(f) That the Respondent should have factored these provisional works into the work program and catered for the possibility of carrying out these works.

(g) That the Respondent not to ask for the provisional sum item to be removed and it remained as part of the contract.

(h) That the arbitrator's analysis on this issue is simply incorrect and the conclusion which he reaches when finding that the Respondent is entitled to more time for a provisional sum item is simply preposterous.

(i) That this was not a variation or new works that were ordered by the

Appellant and these works are part of the Respondent's original scope of works and all that needed to be determined is the amount of rock that the Respondent needed to extract from the site.

(3) The Learned High Court Judge erred in law and in fact in not answering Question 2 in the negative. In this regard, the Learned High Court Judge erred in law and in fact when he failed to consider the following:-

(a) That there is a specific contractual clause which deals with the issue of the amount of rock to extract and the applicable rate, which means that there is no basis for alleging that there was an act for misrepresentation or collateral warranty.

(b) That there is an entire contract clause and the entire contract clause operates to exclude all allegations of misrepresentation and collateral warranties.

(c) That the Respondent was expressly requested in the tender bid documents to satisfy themselves as to the site conditions. They failed to do so and instead claim that as a result of the mediation that there was no need for them to carry out the necessary site investigation.

(d) That the arbitrator was wrong in arriving at the conclusion that there was an act of misrepresentation or a collateral warranty.

(e) That the failure of the arbitrator to consider the relationship between the various relevant clauses in the contract resulted in him arriving at a conclusion which contradicted the applicable law and the terms of the agreement between the parties

(4) The Learned High Court Judge erred in law and in fact in not answering Question 4 in the negative. In this regard, the Learned High Court Judge erred in law and in fact when he failed to consider the following:

(a) That when the arbitration award was issued, the Arbitration Act 1952 was repealed and no longer applicable. The arbitrator therefore could not have awarded interest pursuant to the provisions of the Arbitration Act 1952.

(b) That at the point of issuing the award, the applicable law was that of the Arbitration Act 2005 and the Court of Appeal in the decision of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang* (Civil Appeal No W-02(NCC)(A)-2672–12/2013) ruled that the arbitrator does not have the necessary power to grant pre-award interest that is the grant of pre award interest from January 2003 to December 2014 amounting to approximately RM10 million is bad in law.

(c) That the savings provision found in Section 51 of the Arbitration Act 2005 does not deal with the powers of the arbitrator but rather is limited to issues pertaining to the arbitration agreement and the arbitration proceedings. As such, the power to award interest falls within the purview of the Arbitration Act 2005.

(d) That in any event, it is debatable whether the Arbitration Act 1952 granted the arbitrator the power to grant pre award interest. It does not appear to be the case.

(e) That the relevant sections pertaining to the award of interest in the Arbitration Act 1952 and the Arbitration Act 2005 is similar. As such, a similar interpretation should be given to Section 33 of the Arbitration Act 1952 with regard to the power to grant pre-award interest.

(f) That the decisions which have previously considered the issue of allowing pre-award interest pursuant to the Arbitration Act 1952 have failed to recognise that once there is a statutory provision, common law cannot be imported to interpret that particular section or statute.

(g) That the power to grant interest post award is expressly provided for in the Arbitration Act 1952 but there is no such provision in relation to pre award interest. Therefore Parliament (as with the 2005 Act) has deliberately chosen to exclude the power of the arbitrator to grant pre award interest.

(h) That as a result of the delay in issuing the award, the Appellant is being penalized by interest. The Appellant cannot be responsible for the delay of the arbitrator.

(5) The Learned High Court Judge erred in law and in feet in refusing to intervene to set aside the arbitration award despite there being clear errors made by the Arbitrator as a result of delay of approximately 4 years in publishing the arbitration award. In this regard the Learned High Court Judge erred in law and in fact when he failed to appreciate the following:-

(a) That the arbitrator took a period of 4 years from the close of submissions to issue the final award which amounts to an inordinate delay of which no explanation has been given by the arbitrator.

(b) That it is the duty of the arbitrator, an individual whom has been paid a significant amount of monies, to carry out his function as an administrator of justice to issue the arbitration award within a reasonable time.

(c) That the arbitrator was jointly appointed for his expertise with the believe that he will issue his award promptly so that the dispute between the parties can be resolved within a reasonable time.

(d) That it is not for the parties to remind the arbitrator to issue the arbitration award and neither should the parties be obliged to have to take steps to terminate the arbitrator's appointment.

(e) That the risks of reminding an arbitrator are obvious and the option of terminating the appointment of the arbitrator means having to go through the entire process once again which is a very time consuming and costly affair.

(f) That the Kuala Lumpur Regional Centre for Arbitration's Arbitration Rules provides that an award must be issued within 3 months from the

close of pleadings unless time has been extended.

(g) That once there has been a significant delay in the issuance of the arbitration award, the said award cannot be accorded the same deference of that of an award which is issued promptly.

(h) That given the limited grounds on which an arbitration award can be set aside, this presumes that an award has been properly and promptly issued by the arbitrator and the delay (of 4 years) in the issuance of an award, cannot be accepted as it is contrary to not only what the parties expect and is against the public policy of law of arbitration in Malaysia.

(i) That the arbitrator could not have properly evaluated the evidence, 4 years after close of submissions and 5 years after the evidence was recorded.

DELAY, PUBLIC POLICY AND S 37 OF THE AA 2005

[10] Learned counsel for the appellant submission in our own words can be summarised as follows:

(a) four years delay in delivering the award has compromised the decision making process ie 'there could be possibilities of misrecollections' by the learned arbitrator;

(b) delay in delivering the award is injurious to public good and violates the forum's most basic notion of justice, and relies on the following cases, namely: (i) *BV Scheepswerf Damen Gorinchem v Marine Institute* [2015] EWHC 1810 (Comm); and (ii) *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597;

(c) the delay in the award with a pre-award interests had amounted by itself to RM10.9m; and

(d) even though it was ad hoc arbitration, the present Kuala Lumpur Regional Centre for Arbitration ('KLRCA') Rules requires the award to be delivered within three months with provisions for extension.

[11] The issue of delay of arbitrators from the commencement of arbitration proceedings till the delivery of the award has been seen as an anathema to the concept of arbitration in many jurisdictions and Malaysia is no exception. Malaysian courts once well known for delay in litigation process and backlog of cases has come out of the anathema during the regime of Chief Justice Tun Zaki Azmi itself and our administration of expeditious justice has won accolades from the World Bank (see *No Nonsence: The Authorised Biography of Zaki Azmi The 12th Chief Justice of Malaysia* at pp 11–12).

[12] An arbitrator being a professional and having agreed to a fee for his engagement is contractually obliged to subscribe to the doctrine of good

practice, such as independence, impartiality, accountability, transparency, good governance, etc and very importantly intellectual honesty. Lack of intellectual honesty is the foundation to corrupt practices which will be abhorrent to the rule of law and justice. An arbitrator who is not able to perform his engagement within the reasonable expectation of the parties, ought to disclose at the earliest opportunity, failing which it will impinge on the doctrine of good practice as well as ethics and can be a subject matter for parties to bring an action in contract as well as many areas of tort inclusive of tort of deceit.

[13] The engagement of arbitrator and the legal remedies against him may not be very different from action related to, for example construction contracts and delay issues or professionals such as lawyers and doctors. However, s 47 of the AA 2005 gives some limited protection to the arbitrator. Whether it will cover delay issue is debatable. Section 47 reads as follows:

> 47 Liability of arbitrator
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> An arbitrator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as an arbitrator unless the act or omission is shown to have been in bad faith.

[14] Basically, s 47 to some extent gives immunity to the arbitrator for misconduct. The model law does not have a similar provision. Thus, the arbitrator in Malaysia is a protected species and his conduct in arbitration proceedings in a limited sense cannot be challenged unless bad faith can be established. Bad faith or good faith is one related to mens rea and the issue related to delay and bad faith is one inter-related and it will be within the province of the court to determine the issue in a suitable case and that cannot be done in an application for setting aside of the award unless it can be demonstrated that the delay has in actual fact compromised the decision making process of the arbitrator warranting the court to intervene based on public policy.

[15] It is well established in criminal litigation that delay may be a good ground for setting aside conviction and ordering an acquittal or rehearing. In civil and commercial cases, it is rarely done purely on the delay point if the judgment is a speaking judgment reflective of the notes of evidence, exhibits, etc (see *Monie and Others v Commonwealth of Australia* [2005] NSWCA 25).

[16] The model law concept leans in favour of the arbitrator without provision for disciplinary tribunal and any form of misconduct during the arbitral process or failure of the arbitrator to disclose information which may be material consideration for appointment, etc may not be strictly within the purview of the court once the award has been made. Malaysian law also does not have a disciplinary mechanism for arbitrators coming from the panel of

institutional bodies like KLRCA to check the integrity of arbitration process, the arbitrator as well as the award. Many professional bodies in Malaysia where there is some form of statutory recognition such as for the lawyers or medical practitioners, comes with a disciplinary body to keep in check with the conduct and professionalism of their members to sustain rule of law as well as administration of justice. Arbitrators or adjudicators even appointed by KLRCA are not subject to disciplinary action for conduct, unbefitting of the professional obligation. Countries like India, has amended their Arbitration Act to provide some form of relief to check misconduct (see Indian Arbitration Amendment Act 2015). For example, India has included a provision for disclosure, ie: (i) circumstances disclosing any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to the independence or impartiality of the arbitrator; and (ii) circumstances which are likely to affect the ability to devote sufficient time to the arbitration and in particular the ability to finish the entire arbitration within the statutory time frame. In addition, it has set out time limits for the award to be delivered and also to penalise the arbitrator on his fees as well as terminate his appointment, if the award is not delivered within the time frame. Such drastic steps have not yet been provided in AA 2005 to control the misconduct of arbitrators. Misconduct of arbitrators will generally undermine the growing arbitration industry as it will compromise administration of justice and rule of law. Our constitutional framework requires it to be checked by legislative measures, to uphold the rule of law.

[17] In the instant case, the learned judge had taken into consideration the delay point and had censored the learned arbitrator. To save the award from being setting aside, the learned trial judge had taken a curial scrutiny of the complaint in relation to s 37 as well as s 42 to sustain the award, thereby demonstrating that the appellant did not suffer any material prejudice. The learned judge had also provided some relief by amending the interest provision. The complaint of pre-award interest on the face of record may look unjust but it being loss for use of money for the respondent at the market rate cannot be unjust or abhorrent to the notions of justice to seek court intervention in a party autonomy concept and also in the light of s 36 of the AA 2005. The withholding of that money by the appellant, though no fault of its own in commercial sense, may have been advantageous to the appellant and a loss to the respondent (see *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others* [1993] 1 All ER 664; *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43).

[18] In our view, the delay issue cannot be the sole reason for appellate intervention when in the instant case the learned arbitrator had delivered a speaking award within the contemplation of the law.

[19] Under the old regime ie AA 1952, the court had unfettered discretion to intervene to set aside the award. This wide discretion has been curtailed by AA 2005. Now that, that discretion has been curtailed an application under s 37 on public policy ground or purely delay point and speculative attack on the decision making process, in our view will be a non-starter. Our reasons, inter alia, are as follows:

(a) s 37 as a whole does not give a free hand to the courts to set aside the award based on public policy or breach of natural justice purely on a delay issue;

(b) there are limited procedural mechanism to address the delay issue under AA 2005 and/or to preserve the integrity of arbitral process to some extent. The appellant has not resorted to any of those measures and it is too late to address the delay issue and allow the award to be set aside;

(c) s 37 itself qualifies the rights of the applicant by saying the court 'may' and not shall. The threshold test to satisfy any of the provision of the said section generally must be to do with patent injustice on the face of the record and one where the award cannot be saved by sending it back to the arbitrator for re-consideration (see s 37(6) of the AA 2005);

(d) s 36 will fortify the argument that the award is final and binding on the parties. Section 36 provision is not found in the model law. Section 36 places a higher threshold on the court when it intends to set aside an award related to a s 37 application. In this respect, the decision from other jurisdiction which does not have a similar provision will not be helpful, save those cases which had dealt with the jurisprudence relating to 'patent injustice' or unconscionability, etc. Section 36 of the Act reads as follows:

> 36 An award is final and binding
>
> (1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.
>
> (2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

[20] For reasons stated above, we do not think it is a proper exercise of appellate function to intervene in the decision of the learned judge in relation to Appeal 'No 1075'.

[21] In relation to Appeal 'No 1076', the learned trial judge has summarised the issues as follows:

A (A) Where a construction contract includes a Provisional Sum item whether the contractor can claim an extension of time if it carries out these provisional sum works?

(B) Whether as a matter of law if the contract requires a party to inspect the site, can it derogate its responsibilities by relying on the alleged
B representations made by other party?

(C) Whether pursuant to the Arbitration Act 1952 ('AA 1952'), the Arbitrator is correct in law to grant the Respondent pre-award interest amounting to RM10,975,407.69?

C (D) Whether if the AA 1952 is silent on the issue of the granting of pre-award interest, does the Arbitrator have the powers to grant pre-award interest?

[22] We do not wish to labour on the issues related to s 42 as it requires a high
D threshold to meet and this was explained in great detail by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403. The test for intervention will relate to cases where the award suffers from patent injustice and/or where the award is manifestly unlawful and unconscionable. Usually the consideration which need to be
E taken into account at the initial stage itself will include whether: (i) the point of law attempted to be raised will have substantial effect on the arbitration; (ii) the point have been raised before the arbitrator; (iii) arbitrator's decision must be obviously wrong or the question must be of general public importance and open to serious doubt; and (iv) it must be just and proper for the court to
F determine the question. The learned judge as we had said earlier, to save the award, had taken the initiative to comb the award to justify the award should stand save for the adjustment related to interest. We do not think the appellant had made out a case for s 42 to apply.

G **[23]** For reasons stated above, we take the view that appellate intervention is not warranted and the Appeal 'No 1076' must be dismissed in limine.

[24] Both the appeals are dismissed with costs, subject to payment of allocatur fees. Deposits are to be refunded. We will now hear the parties on the
H issue of costs.

We hereby order so.

Appeals dismissed with costs, subject to payment of allocatur fees.

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Reported by Kohila Nesan